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The First Rape Conviction at the ICC

An Analysis of the Jean-Pierre Bemba Gombo Judgement (accepted for publication 29 April 2016)

Abstract

On 21 March 2016, the International Criminal Court convicted Jean-Pierre Bemba Gombo, a Congolese politician, of crimes against humanity (rape and murder) and war crimes (rape, murder and pillage). Specifically, the Trial Chamber found Bemba, the leader of the Mouvement de libération du Congo (MLC), to be responsible under Article 28 of the Rome Statute for crimes committed by MLC soldiers in the Central African Republic. Bemba was the first defendant to be convicted of rape at the ICC, and the aim of this article is to explore how the judgement contributes to existing international jurisprudence on this crime. It focuses on the Trial Chamber's definition of rape, its discussion of the effects of rape and its reflections on the perpetrators' motives for committing rape.

> To this day, men, women and children who survived are still haunted by the horror of what happened to them, and what they saw happen to other victims. Lives have been destroyed for years and it will take several generations to heal.[1]

1. Introduction

On 21 March 2016, Trial Chamber III of the International Criminal Court (ICC) found the former vice-president of the Democratic Republic of Congo (DRC), Jean-Pierre Bemba Gombo, guilty of crimes against humanity and war crimes, including rape. This is a highly significant judgement on two key levels. Firstly, Bemba, the former leader of the *Mouvement de libération du Congo* (MLC), is the first ICC defendant to be convicted on the basis of command responsibility.[2] To cite the UN Secretary-General, Ban Ki-moon, the verdict thus

[1] F. Bensouda, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Conviction of Mr Jean-Pierre Bemba: "This Case has Highlighted the Critical Need to Eradicate Sexual and Gender-Based Crimes as Weapons in Conflict"', 21 March 2016, available online at https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-bemba-21-03-2016.aspx (visited 25 March 2016).

[2] Bemba is not, however, the first leader to be held responsible for crimes involving sexual violence. In 2014, for example, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that by virtue of their participation in a Joint Criminal Enterprise, Nikola Šainović (the Deputy Prime Minister of the Federal Republic of Yugoslavia), Sreten Lukić (the head of the Serbian Ministry of Interior

'…sends a strong signal that commanders will be held responsible for international crimes committed by those under their authority'.[3] Secondly, this is the first ICC case to end in a conviction for rape.[4] Samira Daoud, from Amnesty International, has therefore described the verdict as 'an historic moment in the battle for justice and accountability for victims of sexual violence in the Central African Republic and around the world'.[5] At the very least, the *Bemba* judgement can give hope to thousands of men and women across the globe that some measure of justice, however slow it is in coming, is possible. The fight against impunity for rape and sexual violence in conflict is necessarily a long and difficult one, and every 'victory' in the process is a step forward.

This article focuses specifically on Bemba's convictions for rape, and more precisely on the way in which the Court approached and discussed these crimes. A rich body of international jurisprudence on rape already exists, and the article's core purpose is to explore how the *Bemba* judgement adds to this case law. It seeks to demonstrate that while the judgement builds on the work of other tribunals, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), certain aspects of it are nevertheless distinctive. Divided into four sections, the article's first section provides background information about the *Bemba* trial and the MLC's crimes. The remaining sections analyze and disaggregate the significance of the judgement by exploring three particular components of it, namely its *definition* of rape, its explicit references to the *consequences* of rape and its discussion of the perpetrators' *motives*.

Affairs) and Nebojša Pavković (the commander of the Third Army of the Yugoslav Army or VJ) were responsible for sexual assaults committed by VJ soldiers in Kosovo. Judgement, *Šainović, Pavković, Lazarević and Lukić* (IT-05-87-A), Appeal Judgement, 23 January 2014, § 1582, 1592, 1603. See also Judgement, *Đorđević* (IT-05-87/1-A), Appeal Judgement, 27 January 2014, § 929.

[3] UN, 'Statement Attributable to the Spokesperson of the Secretary-General on Judgement of the International Criminal Court regarding Jean-Pierre Bemba', 22 March 2016, available online at http://www.un.org/sg/statements/index.asp?nid=9554 (visited 25 March 2016).

[4] The trial of Germain Katanga, a former leader of the *Force de Résistance Patriotique en Ituri* in the DRC, was the first ICC case to include charges of rape (and sexual slavery). On 7 March 2014, however, the Trial Chamber acquitted Katanga of being an accessory to these crimes, which were committed during an attack on the Ituri village of Bogoro in February 2003. It adjudged that rape and sexual slavery did not fall within the 'common purpose' that underpinned the Bogoro attack. Judgement, *Katanga* (ICC-01/04-01/07), Trial Judgement, 7 March 2014, § 1664, 1693.

[5] Cited in Amnesty International, 'ICC Conviction of Former Congolese Vice-President of Rape as War Crime – "Historic Moment"', 21 March 2016, available online at https://www.amnesty.org.uk/press-releases/icc-conviction-former-congolese-vice-president-rape-war-crime-historic-moment (visited 2 April 2016).

2. Bemba's Criminal Responsibility

Bemba was the leader of the MLC, which he founded in November 1998. Now a political party, the MLC was one of the rebel movements that fought against the Congolese government during the Second Congo War (1998-2003).[6] In October 2002, however, the MLC was needed in the CAR. President Ange-Félix Patassé was dealing with an insurgency launched by his former Chief of Staff, François Bozizé; and on 25 October 2002, Patassé requested from Bemba the assistance of the MLC – and in particular its military wing, the *Armée de libération du Congo* (ALC). Bozizé had been dismissed from military service in October 2001, and this led to desertions within the *Forces armées centrafricaines* (FACA). Former members of the army subsequently regrouped in Chad, and in October 2002 they re-entered the CAR and began fighting against the FACA.

Bemba, responding immediately to the call for assistance, 'deployed ALC troops from the DRC to the CAR to intervene in support of President Patassé'.[7] His troops arrived in the CAR on 26 October 2002 and remained in the country until 15 March 2003, when they returned to the DRC. During the '2002-2003 CAR Operation', Bemba's troops committed numerous crimes, including rape. The Trial Chamber established, for example, that '…at the end of October 2002, in a compound in the Bondoro neighbourhood of Bangui [the CAR capital], two soldiers,[8] by force, invaded P68's body by penetrating her vagina with their penises';[9] and '…at the end of October or beginning of November 2002, on a ferry docked at the Port Beach naval base in Bangui, perpetrators, by force, invaded the bodies of eight women from Boy-Rabé and PK12 by penetrating their vaginas with their penises'.[10] Girls as

[6] According to Deibert, 'The movement was largely sponsored by Uganda, and, unlike the ever shifting web of alliances of other Congolese rebel groups, the MLC had a top-down management style with Bemba at its head that would remain largely intact for the duration of the war'. M. Deibert, *The Democratic Republic of Congo: Between Hope and Despair* (London: Zed Books, 2013), 70.

[7] Judgement, *Bemba* (ICC-01/05-01/08), Trial Judgement, 21 March 2016, § 380.

[8] The Trial Chamber found beyond reasonable doubt that, in light of, *inter alia*, their uniforms, language (Lingala), troop movements and the fact that some victims and witnesses had identified them as 'Banyamulengués' (ethnic Tutsis in the DRC), the perpetrators of these crimes were MLC soldiers. *Ibid*., at § 634, 636.

[9] *Ibid*., at § 464.

[10] *Ibid*., at § 483.

young as 12 and 13 were also violated.[11] In addition, widespread pillaging occurred[12] and frequently accompanied acts of rape and murder.[13] The Trial Chamber found that 28 men and women were raped[14] – often by several perpetrators and sometimes in public or in front of family members.[15] It also emphasized, however, that the specific acts covered in the judgement 'constitute only a portion of the total number of acts of murder and rape MLC soldiers committed'[16].

Notwithstanding these crimes committed by his subordinates, Bemba initially carried on with his life as normal. Between 2003 and 2006, he was one of the DRC's vice-presidents; and in 2006, he stood as a candidate in the country's presidential elections. He lost to Joseph Kabila,[17] but was subsequently elected to the Congolese Senate. However, just two years later, on 24 October 2008, he was arrested in Belgium, on an arrest warrant issued by the ICC Pre-Trial Chamber the previous day. He was charged, on the basis of command responsibility, with the crimes against humanity of murder and rape, and with the war crimes of murder, rape and pillaging. The trial commenced on 22 November 2010.

Article 28 of the Rome Statute states, in relevant part, that:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

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[11] *Ibid*., at § 469.

[12] *Ibid*., at § 643-648.

[13] *Ibid*., at § 643.

[14] *Ibid*., at § 633. It is interesting to note that when describing the crimes committed, the Chamber overwhelmingly used the words 'penetrated' and 'invaded', rather than 'raped'. Usage of the term 'invaded' is consistent with the terminology employed in the Elements of Crimes under the Rome Statute – and specifically in Articles 7 (1) (g)-1 and 8 (2) (b) (xxii)-1, § 1-2. See Elements of Crimes, available online at https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf (visited 28 March 2016). In the trial of *Jean-Paul Akayesu* at the ICTR, the Trial Chamber similarly defined rape as, *inter alia*, 'a physical *invasion* of a sexual nature…'. Judgement, *Akayesu* (ICTR-96-4-T), Trial Judgement, 2 September 1998, § 598. According to Obote-Odora, the terminology of invasion 'shifts the focus to the harm that the assailant causes the victim'. A. Obote-Odora, 'Rape and Sexual Violence in International Law: ICTR Contribution', 21 *New England Journal of International and Comparative Law* (2005) 135-159, at 151.

[15] See, for example, *ibid*., at § 488.

[16] *Ibid*., at § 671.

[17] According to Prunier, 'The cannibalism practiced by Bemba's troops in Ituri during the war resurfaced as an election issue'. G. Prunier, *From Genocide to Continental War: The "Congolese" Conflict and the Crisis of Contemporary Africa* (London: Hurst & Company, 2009), 310.

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[18]

During the 2002-2003 CAR Operation, Bemba was largely based in Gbadolite, in Equateur Province in the DRC. However, the Trial Chamber found that as the president of the MLC and the commander-in-chief of the ALC, he was very much aware of everything that his troops were doing in the CAR.[19] For example, Bemba communicated directly with commanders in the field,[20] including with Colonel Moustapha who led the CAR Operation;[21] he made several visits to the CAR;[22] he had disciplinary power over the MLC;[23] and it was Bemba who ultimately ordered his troops to withdraw from the CAR.[24] The Trial Chamber thus concluded that Bemba had operational control over MLC forces in the CAR throughout the duration of the 2002-2003 CAR Operation;[25] and that he 'knew that the MLC forces

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[18] Rome Statute of the International Criminal Court, available online at https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (visited 22 March 2016).

[19] Judgement, *Bemba*, *supra* note 7, at §423-425. According to Stearns, '…Bemba was the unquestioned leader of the MLC, politically as well as militarily. From command central on his couch, he micromanaged the organization, one hand on the remote control of his television, another on his satellite phone or ham radio'. J.K. Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (New York: Public Affairs, 2011), 227.

[20] The Trial Chamber found that 'Generally, however, Mr Bemba did not direct operations at the tactical level or issue orders regarding the specific manoeuvres of the various units in the field'. *Ibid*., at § 399.

[21] On the basis of 'corroborated and reliable evidence' the Trial Chamber found that '…Colonel Moustapha and Mr Bemba regularly communicated by Thuraya [satellite phones] and phonie, with Colonel Moustapha reporting the status of operations and the situation at the front'. *Ibid*., at § 423.

[22] *Ibid*., at § 426.

[23] *Ibid*., at § 449.

[24] *Ibid*., at § 559.

[25] *Ibid*., at § 446.

under his effective authority and control were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging'.[26]

As to whether or not Bemba had also failed to take all necessary and reasonable measures to prevent or repress the crimes committed by his troops, the Trial Chamber acknowledged that he had taken some steps in response to what was happening on the ground. He established, for example, the Mondonga Inquiry to investigate allegations of MLC crimes in the CAR,[27] as a result of which a court-martial was held in Gbadolite, in December 2002, for seven MLC soldiers accused of pillaging.[28] He also set up the Zongo Commission to look into claims that goods pillaged by the MLC were entering the DRC.[29] The Mondonga Inquiry, however, did not address reports of rape;[30] the seven soldiers who faced court-martial were only tried for pillaging minor goods and small amounts of money;[31] and both the remit and the composition of the Zongo Commission were highly circumscribed.[32] The Trial Chamber thus adjudged that the measures which Bemba took were 'a grossly inadequate response' to the crimes being committed by his soldiers.[33] It further found that these measures did not reflect any genuine desire on the part of Bemba to deal with the situation. Rather, his primary concern was simply to repair the MLC's public image.[34]

Having established that Bemba was criminally responsible under Article 28(a) for the crimes committed by the MLC during the 2002-2003 CAR Operation, the Trial Chamber convicted him of crimes against humanity (murder and rape) and war crimes (murder, rape and pillaging).[35] While command responsibility is a well-established doctrine in international

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[26] *Ibid*., at § 717.

[27] *Ibid*., at § 582.

[28] *Ibid*., at § 597. The Trial Chamber noted that 'All seven accused were convicted and sentenced to between three and 24 months of detention exclusively on the basis of their own statements; no other witnesses or victims were interviewed and no physical evidence was collected'. *Ibid*., at § 599.

[29] *Ibid*., at § 601.

[30] *Ibid*., at § 589.

[31] *Ibid*., at § 720.

[32] *Ibid*., at § 722.

[33] *Ibid*., at § 727.

[34] *Ibid*., at § 728.

[35] *Ibid*., at § 752.

criminal law,[36] the fact that Bemba is the first ICC defendant to be convicted on this basis means that the case relays a particularly powerful message about leadership and its concomitant responsibilities. Fundamentally, it sends an unambiguous warning to commanders that they 'cannot take advantage of their power and status to grant to themselves, or their troops, unchecked powers over the life and fate of civilians'.[37] The Trial Chamber also made it clear that it was treating command responsibility as a mode of liability,[38] not as a separate offence of omission.[39] According to Article 28(a) of the Rome Statute, commanders *are criminally responsible for the crimes committed by their forces*.[40]

In her research on variations in war rape, Wood highlights the importance of commanders. The crux of her thesis is that 'If commanders prohibit sexual violence (or if they promote sexual violence but the hierarchy is too weak to enforce that policy), and if individual combatants and their units endorse norms against sexual violence, little sexual violence by those combatants will occur'.[41] It follows, thus, that holding commanders responsible for acts of rape and sexual violence committed by their troops is an important part of any multi-dimensional approach to tackling and curbing these crimes. The possible deterrent functions

[36] In the *Čelebići* case, the ICTY Trial Chamber noted: 'That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law'. Judgement, *Mucić et al*. (IT-96-21-T), Trial Judgement, 16 November 1998, § 332.

[37] Bensouda, *supra* note 1.

[38] Judgement, *Bemba*, *supra* note 7, at § 171. Van Sliedregt notes that 'command responsibility is a multi-layered concept that has traits of a separate offence – a failure to act – and of a mode of liability, a form of participation'. E. van Sliedregt, 'Command Responsibility at the ICTY – Three Generations of Case-Law and Still Ambiguity', in B. Swart, A. Zahar and G. Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 377-500, at 379. The correct conceptualization of command responsibility remains a much-debated issue within existing international jurisprudence. In the *Čelebići* case at the ICTY, for example, the Appeals Chamber underlined that 'As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control'. Judgement, *Mucić et al*. (IT-96-21-A), Appeal Judgement, 20 February 2001, § 198. In the *Krnojelac* case, however, the ICTY Appeals Chamber held that 'It cannot be overemphasized that, where responsibility is concerned, an accused is not charged with the crimes of his subordinates but with his failure to carry out his duty as a superior to exercise control'. Judgement, *Krnojelac* (IT-97-25-A), Appeal Judgement, 17 September 2003, § 171.

[39] In her Separate Opinion, Judge Ozaki underlined that '…the jurisdiction of the Court is complementary to national jurisdictions, and should focus on addressing the most serious crimes of concern to the international community and those persons most responsible for them, rather than addressing a dereliction of duty as such'. Judgement, *Bemba* (ICC-01/05-01/08), Separate Opinion of Judge Kuniko Ozaki, 21 March 2016, §5.

[40] Author's emphasis.

[41] E.J. Wood, 'Armed Groups and Sexual Violence: When is Wartime Rape Rare?' 36 *Politics and Society* (2009) 131-162, at 141.

of command responsibility, however, lie beyond the scope of this paper. The focus of this research is specifically on the contribution that the *Bemba* judgement makes to existing international jurisprudence on rape, starting with how the judgement defines rape.

3. Defining Rape, De-Centring Consent

Until the late 1990s, there was no definition of rape in international law.[42] Today, a substantial body of international jurisprudence exists, but, as Weiner has emphasized, 'International criminal tribunals prosecuting crimes of sexual violence in prior conflict zones such as Rwanda, Sierra Leone, and the former Yugoslavia have struggled to develop a coherent definition of the elements of rape'.[43] At the heart of this issue is the relationship between rape, force/coercion and consent.

The Kunarac approach

In the ICTY's recent first instance judgement against Radovan Karadžić, the former Bosnian Serb leader, the Trial Chamber noted that 'Rape involves sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim'.[44] This was the definition that was adopted in the trial of *Kunarac, Kovač and Vuković*, the ICTY's leading case on rape. The defendants were Bosnian Serb soldiers who stood accused of the mass rape of Bosnian Muslim (Bosniak) women in the town of Foča, in eastern BiH. The fact that these

[42] In the *Furundžija* trial at the ICTY, the Trial Chamber stressed that 'No definition of rape can be found in international law'. Judgement, *Furundžija* (IT-95-17/1-T), Trial Judgement, 10 December 1998, § 175. The significance of this clearly emerged in the *Kaing Guek Eav* ('Duch') case at the Extraordinary Chambers in the Courts of Cambodia (ECCC). The Trial Chamber in that case treated rape as part of the crime against humanity of torture, but not as a crime against humanity in its own right. Judgement, *Kaing* (001/18-07-2007/ECCC/TC), Trial Judgement, 26 July 2010, §567. The Co-Prosecutors appealed against this. The Supreme Court Chamber, however, noting that the Court's jurisdiction extends from 17 April 1975 to 6 January 1979, emphasized that during these four years, there was no international treaty or convention that prohibited rape as a crime against humanity. Judgement, *Kaing* (001/18-07-2007-ECCC/S), Appeal Judgement, 3 February 2012, § 176. Further underlining that it was not until the 1990s that rape began to take shape as a crime against humanity (§ 179), the Supreme Court Chamber concluded that '…a survey of custom and treaties before and during the ECCC's temporal jurisdiction indicates that rape was not a distinct crime against humanity under those sources of international law at the relevant time' (§ 180). This ground of the Co-Prosecutors' appeal accordingly failed.

[43] P. Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law', 54 *Boston College Law Review* (2013) 1207-1237, at 1207.

[44] Judgement, *Karadžić* (IT-95-5/18-T), Trial Judgement, 24 March 2016, § 511.

abuses occurred in camps and other places of detention led the Trial Chamber to revisit the definition of rape adopted three years earlier in the *Furundžija* case. It opined that the *Furundžija* definition, which requires sexual penetration accompanied by coercion, force or threat of force against the victim or a third person,[45] is essentially too narrow because it does 'not refer to other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim…'.[46]

Emphasizing that rape is quintessentially a violation of sexual autonomy,[47] the key issue for the *Kunarac* Trial Chamber was not whether force or coercion had been used, but rather whether the victims had been in a position to give consent. The Trial Chamber thus defined rape as entailing more than simply an absence of consent. What it also required is that consent, when given, must be 'given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances'.[48] What *Kunarac* tells us, therefore, is that rape is fundamentally about consent, but that consent becomes redundant if circumstances (beyond coercion, force or threat of force) are such that it cannot be freely given.[49] The Appeals Chamber agreed with this.[50]

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[45] The Trial Chamber in *Furundžija* defined rape as: '(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person'. Judgement, *Furundžija*, *supra* note 42, at § 185.

[46] Judgement, *Kunarac, Kovač and Vuković* (IT-96-23-T& IT-96-23/1-T), Trial Judgement, 22 February 2001, § 438.

[47] *Ibid*., at § 440.

[48] '[T[he *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim'. *Ibid*., at § 460.

[49] *Ibid*., at § 460. This is consistent with Article 96 (ii) of the ICTY's Rules of Procedure and Evidence which states that 'consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, Or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear'. ICTY Rules of Procedure and Evidence, available online at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf (visited 26 March 2016). Although consent was not discussed in the *Furundžija* case, the Trial Chamber essentially reached the same conclusion and underlined its position that 'any form of captivity vitiates consent'. *Furundžija*, Judgement, *supra* note 42, at § 271.

Other courts have largely followed the *Kunarac* approach to rape.[51] Questions remain, however, regarding the appropriateness of applying a consent-based definition in the context of war crimes and crimes against humanity.[52] Prosecutors at the ICTY, for example, have suggested that this is 'an area where perhaps the OTP [Office of the Prosecutor] could have paid more attention to forcefully explaining to the chambers the pitfalls of automatically incorporating domestic law concepts that are not well-suited to the distinctive framework of international criminal law'.[53] The OTP at the ICTR has also expressed concerns and posited that there are 'strong reasons' to reject a consent requirement in conflict and post-conflict contexts.[54] One of the reasons why the *Bemba* judgement is significant is precisely because it does not employ a consent-based definition of rape.

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[50] Judgement, *Kunarac, Kovač and Vuković* (IT-96-23& IT-96-23/1-A), Appeal Judgement, 12 June 2002, §127-128. See also Judgement, *Kvočka et al.* (IT-98-30/1-A), Appeal Judgement, 28 February 2005, § 395; Judgement, *Gacumbitsi* (ICTR-2001-64-A), Appeal Judgement, 7 July 2006, § 151.

[51] See, for example, Judgement, *Semanza* (No. ICTR-97-20-T), Trial Judgement and Sentence, 15 May 2003, § 345; Judgement, *Kaing*, *supra* note 42, at § 362-363; Judgement, *Gacumbitsi*, *ibid*., at § 155. The Special Court for Sierra Leone (SCSL) has adopted a narrower approach, by emphasizing that force or threat of force provide clear evidence of non-consent. Judgement, *Brima, Kamara and Kanu* (SCSL-04-16-T), Trial Judgement, 20 June 2007, § 493-494; Judgement, *Sessay, Kallon and Gbao* (SCSL-04-15-T), Trial Judgement, 2 March 2002, § 1461.

[52] Cole, for example, maintains that 'Although it cannot be denied that a woman's autonomous consent should be the prerequisite for anything done to her body, the definition of rape under international criminal law ordinarily presupposes a context of armed conflict, the victims of which by definition are under a non-consensual attack. In other words, the determination of jurisdiction amounts to a determination that the sexual act took place in a context in which sexual autonomy was absent'. A. Cole, '*Prosecutor v. Gacumbitsi*: The New Definition for Prosecuting Rape under International Law', 8 *International Criminal Law Review* (2008) 55-86, at 75. In a similar vein, Schomburg and Peterson opine that 'Although other factors may play an additional role, they cannot supersede the inherent coerciveness of crimes under international law and cannot serve as an argument for considering nonconsent as an element of crimes of sexual violence in this context'. W. Schomburg and I. Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law', 101 *American Journal of International Law* (2007) 121-140, at 139.

[53] M. Jarvis and N. Nabti, 'Policies and Institutional Strategies for Successful Violence Prosecutions', in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) 73-110, at 94-95. The *Kunarac* Trial Chamber, for example, reviewed other legal jurisdictions and concluded that '…the basic underlying *principle* common to them was that sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim'. Judgement, *Kunarac*, *supra* note 46, at § 440.

[54] OTP, *Prosecution of Sexual Violence: Best-Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions – Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, 30 January 2014, available online at http://w.unictr.org/sites/unictr.org/files/legal-library/140130_prosecution_of_sexual_violence.pdf (visited 2 July 2014), 58.

Bemba and the 'de-centring' of consent

What is immediately striking about the *Bemba* judgement is the fact that it contains very few references to consent.[55] Rape is not defined in the Rome Statute but in the accompanying Elements of Crimes. The latter define rape – as a crime against humanity or war crime – as occurring when:

> 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
>
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[56]

The Bemba Trial Chamber utilized this definition of rape.[57] Moreover, it explicitly emphasized that '…the victim's lack of consent is not a legal element of the crime of rape under the Statute'.[58] It noted from the preparatory works of the Statute that the drafters were of the view that requiring the Prosecution to prove the victim's non-consent 'would, in most cases, undermine efforts to bring perpetrators to justice'.[59]

The Trial Chamber therefore focused on the four possible circumstances for rape that are set out in the Elements of Crimes. Only the fourth of these circumstances refers to consent and stipulates that 'the invasion was committed against a person incapable of giving genuine consent'. Regarding the meaning of 'incapable', the *Bemba* Trial Chamber noted that 'Footnotes 16 and 64 of the Elements of Crimes clarify that "a person may be incapable of

[55] It discussed consent primarily in the context of pillaging. For example, '…the Chamber is of the view that in certain circumstances lack of consent can be inferred from the absence of the rightful owner from the place from where property was taken'. Judgement, *Bemba*, *supra* note 7, at § 116.

[56] Article 7 (1) (g)-1 and Article 8 (2) (b) (xxii)-1, Elements of Crimes, *supra* note 14, at § 1, 2.

[57] Judgement, *Bemba*, supra note 7, at § 99, 102.

[58] *Ibid*., at § 105. Similarly, in the *Katanga* judgement, the Trial Chamber noted that '…save the very specific situation of a person whose "incapacity" was "tak[en] advantage of", the Elements of Crimes do not refer to the victim's lack of consent, and therefore this need not be proven'. Judgement, *Katanga*, *supra* note 4, at § 965.

[59] *Ibid*.

giving genuine consent if affected by natural, induced or age-related incapacity"'.[60] This is a very different situation from coercive circumstances overpowering a victim's free will, as discussed in *Kunarac*. Although it is unclear which factors may 'induce' an incapacity to give consent, the particular positioning of the word 'induced' between 'natural' and 'age-related' arguably limits the range of potential inducing factors. Fundamentally, therefore, the Elements of Crimes appear to draw a clear distinction between circumstances and consent, and the *Bemba* judgement reinforces this. It underscores that 'where "force", "threat of force or coercion", or "taking advantage of a coercive environment" is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent'.[61] The Pre-Trial Chamber, moreover, referred to '…the constitutive elements of force or coercion in the crime of rape…'.[62]

Hence, a significant way in which the *Bemba* judgement differs from existing international jurisprudence on rape is that it treats circumstances – as set out in the Elements of Crimes – as important in their own right, rather than in the more limited sense of whether they vitiate consent. In this regard, the judgement particularly adds to extant case law through its discussion of the term 'coercive environment'. It is clear from the wording of the Elements of Crimes that a 'coercive environment' is broader than force, threat of force or coercion. The *Bemba* judgement, however, usefully concretizes this concept, taking guidance from the *Akayesu* judgement at the ICTR. In that case, the Trial Chamber offered a definition of rape[63] that necessitated a discussion of the words 'coercive circumstances' and underlined that:

> [C]oercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe [militia] among refugee Tutsi women at the bureau communal.[64]

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[60] *Ibid*., at § 107.

[61] *Ibid*., at § 106. See also Judgement, *Katanga*, *supra* note 4, at § 965.

[62] Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *Bemba* (ICC-01/05-01/08), Pre-Trial Chamber, 15 June 2009, § 310.

[63] '…a physical invasion of a sexual nature committed on a person under circumstances which are coercive'. Judgement, *Akayesu*, *supra* note 14, at § 686.

[64] *Ibid*., at § 688.

This is an important definition that recognizes the multi-layered reality of coercion in situations of armed conflict, and the fact that it can assume both active (actions) and passive (circumstances) forms. Similarly, the *Bemba* Trial Chamber broadly construed the meaning of 'coercive environment'. It found, for example, that in addition to the presence of a hostile military force among a civilian population, several other factors could contribute to creating a coercive environment. These included 'the number of people involved in the commission of the crime, or whether the rape is committed during or immediately following a combat situation, or is committed together with other crimes'.[65] This notion of situational coercion is inherently suited to the realities and complexities of conflict situations.

The *Kunarac* definition of rape itself places a strong emphasis on 'coercive circumstances', broadly construed. However, the Trial Chamber arguably limited the significance of these circumstances by 'pinning' them to the question of consent. *Kunarac*, in short, epitomizes a 'functional' approach to circumstances; the central issue is whether the presence of coercive circumstances impacted on the victim's ability to freely give consent. In contrast, the concept of a 'coercive environment', detached from the issue of consent, potentially creates the space for a greater focus on what the victim *experienced* within the context of that environment.

Particularly salient in this regard is the fact that the Elements of Crimes require the 'taking advantage of a coercive environment', rather than simply the existence of a coercive environment. The *Bemba* judgement refers only briefly to this notion of taking advantage.[66] This is presumably because there was sufficient evidence in the *Bemba* case of force, or threat of force or coercion (the first and second circumstances set out in the Elements of Crimes).[67] As such, it was unnecessary for the Trial Chamber to consider whether MLC troops had taken advantage of a coercive environment. The terminology of 'taking advantage', however, is highly significant. Fundamentally, it reflects the abuse of power

[65] Judgement, *Bemba*, *supra* note 7, at § 104.

[66] *Ibid*.

[67] This was more explicit in the Pre-Trial Chamber's discussions. For example, it stated, *inter alia*, that 'The evidence shows that direct witnesses were raped by several MLC perpetrators in turn, that their clothes were ripped off by force, that they were pushed to the ground, immobilised by MLC soldiers standing on or holding them, raped at gunpoint, in public or in front of or near their family members. The element of force, threat of force or coercion was thus a prevailing factor'. Decision, *Bemba*, *supra* note 62, at § 165.

which rape embodies,[68] and it more effectively captures the totality of the crime than an approach that places consent at the centre of the enquiry. According to Grewal, 'While consent in the context of rape laws has sometimes been a problematic concept, it has also been seen as a key means of recognizing the right of an individual to exercise freedom of choice and control over one's body and life'.[69] Yet, precisely because the term 'taking advantage of a coercive environment' refers not just to a behaviour, but more specifically to a behaviour that takes place within a particular context, it can be argued that it more effectively encapsulates the diversity of factual matrixes that inhibit an individual's sexual autonomy and freedom of choice.

Rule 70 of the ICC's Rules of Procedure and Evidence (RPE) helps to illustrate this point. Halley submits that there are contradictions between the Court's RPE and Elements of Crimes. In particular, she asserts that Rule 70 of the RPE provides a consent-based defence, while in the Elements of Crimes, in contrast, 'we have a definition of rape that seems actually to preclude a consent defense'.[70] Rule 70 states, in relevant part, that:

> In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:
>
> (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
> (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
> (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.[71]

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[68] See, for example, S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Fawcett Columbine, 1975), 49. Noting that '…various states criminalize sexual acts between individuals in unequal positions of power, irrespective of the consent of the victim', Schomburg and Peterson maintain that 'If international criminal law relied at all on domestic law to define sexual violence, it should draw from such examples instead of general provisions that focus on consent'. Schomburg and Peterson, *supra* note 52, at § 138-139. Indeed, the second circumstance listed in the Elements of Crimes specifically refers to 'abuse of power'.

[69] K. Grewal, 'The Protection of Sexual Autonomy under International Law: The International Criminal Court and the Challenge of Defining Rape', 10 *Journal of International Criminal Justice* (2012) 373-396, at 383.

[70] J. Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (2008) 1-123, at 119

[71] ICC, Rules of Procedure and Evidence, available online at https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf (visited 24 April 2016). Rule 70 echoes Rule 90 of the SCSL's Rules of

The *Bemba* judgement does not discuss Rule 70. It simply notes that, '…the Chamber, when analysing evidence, is guided by Rules 70 and 71,[72] which set out several principles of evidence in cases of sexual violence'.[73] The *Katanga* judgement, however, offers more in relation to Rule 70. It emphasizes that:

> The Elements of Crimes clearly seek to punish any act of penetration where committed under threat of force or of coercion, such as that caused by the threat of violence, duress, detention, psychological pressure or abuse of power or, more generally, any act of penetration taking advantage of a coercive environment. The establishment of at least one of the coercive circumstances or conditions set out in the second element is therefore sufficient alone for penetration to amount to rape within the meaning of articles 7(1)(g) and 8(2)(e)(vi) of the Statute.[74]

In the following paragraph, it further states that, '…in terms of procedure, the Rules of Procedure and Evidence confirm this interpretation by stipulating the principles applicable to evidence in matters of sexual violence'.[75] Taken together, these two paragraphs appear to suggest, *pace* Halley, that there is no contradiction between the Elements of Crimes and Rule 70. By placing important limits on when consent can be inferred, Rule 70 thus reinforces the importance of circumstances as established in the Elements of Crimes. Furthermore, because it explicitly introduces into the relationship between consent and circumstances the additional dimension of how a victim behaves, speaks and reacts in those circumstances, Rule 70 reflects a contextually-sensitive approach to rape that is more focused on the entirety of the victim's experiences. In *Katanga*, for example, some of the witnesses who had been raped described how the perpetrators referred to them as their 'wives'.[76] In a country like the DRC where marital rape is not recognized,[77] this 'wife' label both constrained women's choices and contributed to their suffering. As witness P-132 underlined, 'You know full well that

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Evidence, as discussed in the *Armed Force Revolutionary Council (AFRC)* judgement. Judgement, *Brima, Kamara and Kanu*, supra note 51, at § 114.

[72] Rule 71 states that '…a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness'.

[73] Judgement, *Bemba*, *supra* note 7 at § 109.

[74] Judgement, *Katanga*, *supra* note 4, at § 965.

[75] *Ibid*., at § 966.

[76] See, for example, *ibid*., at § 997.

[77] Immigration and Refugee Board of Canada, 'Democratic Republic of Congo: Domestic and Sexual Violence, including Legislation, State Protection and Services Available to Victims', 17 April 2012, available online at http://www.refworld.org/docid/4f9e5e532.html (visited 24 April 2016).

when someone takes you for his wife, he can have sexual intercourse whenever and however he wishes. He told me that I had become his wife. I could not refuse'.[78]

If, as this article maintains, the Elements of Crimes and RPE potentially thus allow for a more experiential approach to rape, a second important dimension of the *Bemba* judgement is precisely that it discusses some of the consequences of the rapes that MLC forces committed in the CAR.

4. The Consequences of Rape

In the *Čelebići* trial at the ICTY, the Trial Chamber reflected on some of the consequences of rape. Describing it as 'a despicable act which strikes at the very core of human dignity and physical integrity', it underscored that rape causes severe physical and psychological pain and suffering, adding that the psychological effects of the crime 'can be particularly acute and long lasting'.[79]

In the *Nikolić* case, also at the ICTY, a section of the Trial Chamber sentencing judgement discusses some of the long-term consequences for the men and women who were imprisoned in the Sušica camp in Vlasenica, in eastern Bosnia. It cites a witness who was raped in the camp. She explains, 'I feel miserable, degraded. I wanted to be a good mother, the best I could. I wanted my child to grow up in a beautiful family, but that couldn't be any more. I felt humiliated as a woman and as a mother by the very fact that I was there in that camp in that situation'.[80]

In the *Akayesu* case, the first trial at the ICTR to address the use of rape during the 1994 Rwandan genocide, the Trial Chamber acknowledged some of the ways in which Witness JJ's trauma had impacted on her life. It noted that she 'testified to the humiliation she felt as a mother, by the public nudity and being raped in the presence of children by young

[78] Judgement, *Katanga*, *supra* note 4, at § 1000.

[79] Judgement, *Mucić et al*., *supra* note 36, at § 495.

[80] Judgement, *Nikolić* (IT-94-2-S), Trial Sentencing Judgement, 18 November 2003, § 203.

men…Witness JJ told the Chamber that she had remarried but that her life had never been the same because of the beatings and rapes she suffered'.[81]

Within the *Bemba* judgement, the multiple consequences of the MLC's rapes are discussed in considerable detail. Some of the MLC's victims in the CAR sustained physical injuries. After being raped by three soldiers in early November 2002, for example, '…P80 had physical injuries to her vagina, back, pelvis, kidneys, and eyes…';[82] and P81, who was sexually violated by four soldiers, also in November 2002, had abdominal pains and problems conceiving.[83] As in Rwanda during the genocide, some women became infected with the HIV virus.[84] However, it was not only women who were sexually abused by members of Bemba's MLC. P23 was raped by three soldiers, in front of his family members and a neighbour. Afterwards, he '…could not walk, as his anus was swollen and he was treated only with traditional leaves'.[85] P69 was also raped, by two soldiers, which led to 'severe damage to his anus…'.[86] For others, the consequences of being raped were primarily psychological. P22, for example, 'was suicidal, reluctant to engage in any sexual relationship and exhibited symptoms consistent with post-traumatic stress disorder ("PTSD")'.[87]

Understanding the effects of rape, however, requires a holistic approach that extends beyond a focus on physical and psychological harms. It is noteworthy, therefore, that the *Bemba* Trial Chamber also discussed some of the wider social and economic consequences of rape. For example, twelve soldiers raped V1 orally, vaginally and anally. As well as subsequently experiencing pain in her vagina and lungs, and having psychological problems, 'She felt like she was no longer treated as a human being and was called the "Banyamulengué wife"'.[88] She became a social outcast within her own community, and this in turn 'left her unemployed and

[81] Judgement, *Akayesu*, *supra* note 14, at § 423.

[82] Judgement, *Bemba*, *supra* note 7, at § 488.

[83] *Ibid*., at § 492.

[84] *Ibid*., at § 545.

[85] *Ibid*., at § 494.

[86] *Ibid*., at § 498.

[87] *Ibid*., at § 508.

[88] *Ibid*., at § 551. The Trial Chamber noted that 'Many CAR civilians used the term "Banyamulengué" (or phonetically similar terms) to refer to the MLC troops. Civilians could identify the MLC troops due to their presence in certain areas and other characteristics, including language, weapons, and uniforms' (§ 563).

unable to provide for her children'.[89] P82 was between 10 and 13 years old (her precise age was unclear) when she was raped. In addition to her physical injuries, she was 'socially excluded by other girls of her age'.[90] After P23 was raped, he no longer felt respected within his community and saw himself as a 'dead man';[91] and before P69 was orally and anally penetrated, at least four soldiers had also 'slept with'[92] his wife, who subsequently needed to have an operation. As a result of these events, P69's family, in his words, was 'completely destroyed'.[93]

Some commentators may question whether it is appropriate for an international court to discuss at such length the various ways in which rape can affect victims' lives. The consequences of rape are tangential to the central issue of whether a defendant is guilty of rape. It might be argued, therefore, that introducing more affective elements into the trial process potentially interferes with the defendant's right to a fair trial. Conversely, the claim could also be made that it is not beneficial to witnesses themselves to focus heavily on the consequences of what they experienced as it risks essentializing them as victims. Discussing the *Kunarac* trial, for example, a former ICTY prosecutor, Peggy Kuo, has explained that she viewed the witnesses as survivors rather than victims. In her words,

> Sometimes people will talk about how the women were humiliated. But I always try to turn that around and say, "The perpetrators tried to humiliate them and they tried to take away their human dignity. But the people who came and testified were able to maintain their dignity. And they didn't let the perpetrators take their humanity away from them".[94]

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[89] *Ibid*., at § 551.

[90] *Ibid*., at § 589.

[91] *Ibid*., at § 494.

[92] Some witnesses used the words 'slept with' rather than 'raped' or 'penetrated'. Similarly, Rwandan women who testified at the ICTR frequently employed words other than 'rape' to describe what had happened to them, due to social taboos. According to the Tribunal's OTP, '…some Rwandan rape victims would refer to rape or penetration by stating that the perpetrator "married me", "put his sex in me", "made me a woman", "spoiled me", "killed me with his thing", or "made me his wife"'. OTP, *supra* note 54, at 14. The issue of terminology was also discussed in the Akayesu Trial Chamber Judgement. Judgement, *Akayesu*, *supra* note 14, at § 152.

[93] *Ibid*., at § 498.

[94] Cited in P. Gopanal, D. Kravetz and A. Menon, 'Proving Crimes of Sexual Violence', in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) 111-171, at 112.

The fact that the *Bemba* Trial Chamber discussed some of the many effects of the rapes committed by MLC soldiers is, however, extremely important. The first reason is that one of the common criticisms of criminal trials is that victim-witnesses are simply in court to give evidence. Their role is to help the judges to establish whether or not a particular defendant is guilty. In the words of an ICTR prosecutor, 'The trial process has its own needs'[95] – and these needs take priority. Courts are interested in ascertaining the facts, and this, in turn, leads to a marginalization of victims' needs.[96] If, as Coulter maintains, 'In most "war narratives" it is the individual women's bodies and the violence done to them that occupy center stage',[97] the same argument is equally pertinent vis-à-vis international criminal courts. If victim-witnesses speak about their emotions, and about how their lives have been affected as a result of rape, this becomes problematic because it necessarily raises the issue of needs; and rape gives rise to a multiplicity of complex needs, both short-term and long-term, that courts are not designed to address. The criminal trial process accordingly limits the stories that victims are able to tell. As Dixon underscores,

> …there is no opportunity for women to speak about crimes of secondary victimization committed by their own intimates and communities. There is no discursive space to document the likelihood that the victims of rape will face other secondary harms such as rejection, repression, destitution and continuing prostitution.[98]

In the *Bemba* trial, victim-witnesses – men and women – were given the opportunity to tell the court how the MLC's crimes had affected them and their daily lives.[99] Not only does this

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[95] Cited in J. Koomen, '"Without These Women, the Tribunal Cannot do Anything": The Politics of Witness Testimony on Sexual Violence at the International Criminal Tribunal for Rwanda', 38 *Signs: Journal of Women in Culture and Society* (2013) 253-277, at 264.

[96] K. McEvoy and K. McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', 22 *Social and Legal Studies* (2013) 489-513, at 494.

[97] C. Coulter, *Bush Wives and Girl Soldiers: Women's Lives through War and Peace in Sierra Leone* (Ithaca: Cornell University Press, 2007), 18-19.

[98] R. Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?' 13 *European Journal of International Law* (2002) 697-719, at 705.

[99] Additional insights were provided by the legal representatives of victims. One of these representatives, for example, told the Court that: 'There was also a victim who presented her concerns in public and this is Victim a/0542/08. She explained that she had her period when the Banyamulenge raped her and one of them shoved the barrel of his gun into her vagina to punish her for allegedly having her period deliberately at that time. Following her rape, she was abandoned by her husband. That is double suffering'. Trial transcript, *Bemba* (ICC-01/05-01/08), 13 November 2014, 3, available online at https://www.icc-cpi.int/iccdocs/doc/doc2194807.pdf (visited 25 April 2016).

individualize victims, but it also creates the space for greater acknowledgement and understanding of their needs – and particularly their long-term needs. What makes this especially important in the *Bemba* case is that unlike the ICTY and ICTR, the ICC has a capacity – through, for example, its power to award reparations[100] and its Trust Fund[101] – to respond in a concrete way to some of the multiple needs of victims in post-conflict societies. Sajad is correct in arguing that, 'Ultimately, seeking justice in courts of law does not overcome many of the socio-political circumstances that define the realities of survivors of wartime and genocidal sexual violence'.[102] In the *Bemba* case, however, victim-witnesses were given the opportunity to bring those realities into the courtroom, and this is one way in which to develop a more 'holistic' justice[103] that fuses retributive and restorative elements and takes account of victims' needs.[104] It should be noted in this regard that the Trial Chamber considered not only the consequences of rape, but also the impact of the MLC's widespread looting.[105] The judgement thus reflects 'the range of conflict-related harms experienced by the victims…',[106] and it thereby avoids 'singling out' and essentializing those who were raped.

The *Bemba* judgement's discussion of some of the effects and consequences of rape is also important for a second reason. That many of the victims of Bemba's MLC subsequently experienced further suffering at the hands of their own communities underscores the global problem of persistent rape stigma. According to a woman who was raped in the DRC, for example,

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[100] Article 75 of the Rome Statute.

[101] Article 79 of the Rome Statute.

[102] T. Sajjad, 'Rape on Trial: Promises of International Jurisprudence, Perils of Retributive Justice, and the Realities of Impunity', in C. Rittner and J.K. Roth (eds), *Rape: Weapon of War and Genocide*, (St. Paul, MN: Paragon House, 2012) 61-81, at 75.

[103] A. Boraine, 'Transitional Justice: A Holistic Interpretation', 60 *Journal of International Affairs* (2006) 17-27.

[104] S. Robins, 'Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal', 5 *International Journal of Transitional Justice* (2011) 75-98.

[105] It noted that 'Victims of pillaging were often left with nothing. The consequences were far-reaching. For example, P73 was unable to pay for medical treatment, V2's business has never recovered from the loss of necessary equipment, and many victims were left without, *inter alia*, their savings, foam mattresses, and clothes, which they had worked hard to obtain'. Judgement, *Bemba*, *supra* note 7, at § 568.

[106] Jarvis and Nabti, *supra* note 53, at 87.

> When [other women] see you walking, if it is two of them, they start gossiping and they say: "Do you know that this woman has been raped?"…When we see that, we are heart-broken because everyone is talking about what happened to us – then they start finger pointing at us, and you start crying. We are not even able to go to church to pray.[107]

In neighbouring Rwanda, Mukamana and Brysiewicz point out that those who were raped during the genocide have been treated differently from other groups of victims. As one illustration, 'After the genocide organized rituals of mourning were held for people who had lost their loved ones and these people were able to benefit from the sympathy and support of their community'. In contrast, there were no such ceremonies for victims of rape.[108]

These examples underscore the need for greater education and sensitization efforts, which are crucial tools in the fight against rape stigma. It is essential for local communities to have more awareness and understanding of rape and of what it can do to victims and their lives. The fact, therefore, that the *Bemba* Trial Chamber explicitly discussed some of the effects of the MLC's rapes highlights the potential for courts themselves to be involved – indirectly – in combatting the stigma and prejudices that continue to cling to crimes of rape and sexual violence.

5. Motives for Rape

In the *Furundžija* trial at the ICTY, which focused on the interrogation and sexual abuse of Witness A, the Trial Chamber found that:

> Witness A was interrogated by the accused [Furundžija].[109] She was forced by Accused B to undress and remain naked before a substantial number of soldiers…The purpose of this abuse was to extract information from Witness A about her family, her connection

[107] J. Kelly, J. Kabanga , W. Cragin , L. Alcayna-Stevens, S. Haider and M.J. Vanrooyen, '"If Your Husband Doesn't Humiliate You, Other People Won't': Gendered Attitudes Towards Sexual Violence in Eastern Democratic Republic of Congo', 7 *Global Public Health: An International Journal for Research, Policy and Practice* (2012) 285-298, at 290.

[108] D. Mukamana and P. Brysiewicz, 'The Lived Experience of Genocide Rape Survivors in Rwanda', 40 *Journal of Nursing Scholarship* (2008) 379-384, at 380.

[109] Anto Furundžija was a Bosnian Croat soldier and the head of the 'Jokers', a unit of the Croatian Defence Council (HVO) in Central BiH.

> with the ABiH [Army of Bosnia-Hercegovina] and her relationship with certain Croatian soldiers, and also to degrade and humiliate her. [110]

Similarly, in the *Čelebići* trial, the Trial Chamber explicitly commented on some of the purposes underpinning the rape of two Bosnian Serb women by Hazim Delić, the Bosniak deputy commander of the Čelebići camp. Delić raped Grozdana Ćećez, the Trial Chamber found,

> …*inter alia*, to obtain information about the whereabouts of Ms. Ćećez's husband who was considered an armed rebel; to punish her for her inability to provide information about her husband; to coerce and intimidate her into providing such information; and to punish her for the acts of her husband.[111]

In keeping with these examples, the *Bemba* Trial Chamber discussed some of the purposes of the rapes committed by MLC soldiers in the CAR. These included a desire both to punish civilians in the CAR (and specifically those suspected of supporting General Bozizé)[112] and to 'destabilise, humiliate, and punish suspected rebels and rebel sympathisers'.[113] The Trial Chamber also noted that some MLC soldiers regarded their victims as 'war booty'.[114] It went on to underline that the MLC's objectives were often realized in the sense that 'rape victims experienced significant medical, psychiatric, psychological, and social consequences, including PTSD, HIV, social rejection, stigmatisation, and feelings of humiliation, anxiety, and guilt'.[115]

Significantly, the *Bemba* judgement not only discusses some of the purposes underlying the MLC's use of rape. It also – and unusually – addresses the issue of motives. Taylor has argued that 'If our morality were truly victim-centred…we would spend less time worrying about the perpetrator motives and more time focused on repairing and preventing harm…'.[116]

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[110] Judgement, *Furundžija*, *supra* note 42, at § 124.

[111] Judgement, *Mucić et al*., *supra* note 36, at § 941.

[112] Judgement, *Bemba*, *supra* note 7, at § 565.

[113] *Ibid*., at § 567.

[114] *Ibid*.

[115] *Ibid*.

[116] K. Taylor, *Cruelty: Human Evil and the Human Brain* (Oxford: Oxford University Press, 2009), 258.

Criminal courts are neither victim-centred processes nor are they places for reflection on – much less 'worrying about' – a perpetrator's possible motives for committing a crime. As the ICTY Appeals Chamber underlined in the *Tadić* case, '…motive is generally irrelevant in criminal law…'.[117] This includes rape cases. Various ICTY chambers, for example, 'have repeatedly rejected alleged sexual motivations as a defence to sexual violence as torture, finding that sexual motives could not displace the purpose behind the act'.[118]

The *Bemba* Trial Chamber, however, focused not on sexual motives, but rather on socio-economic motives. It emphasized, for example, that 'The MLC troops in the CAR did not receive adequate financial compensation and, in turn, self-compensated through acts of pillaging and rape'.[119] In so doing, they relied upon the so-called 'Article 15', which unofficially gave MLC forces the green light to do whatever was necessary to 'make ends meet'.[120] Some MLC soldiers, moreover, told their victims that they were hungry.[121] Scholars have frequently sought to explain the occurrence of rape in war through a focus on macro structural factors, such as militarism, patriarchy and gender relations.[122] Such explanations are often overly-broad and they neglect the micro dynamics of causation.[123] The *Bemba* Trial

[117] Judgement, *Tadić* (IT-94-1-A), Appeal Judgement, 15 July 1999, § 268.

[118] L. Baig, M. Jarvis, E. Martin Salgado and G. Pinzauti, 'Contextualizing Sexual Violence: Selection of Crimes', in S. Brammertz and M. Jarvis (eds), *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford: Oxford University Press, 2016) 171-219, at 191. See, for example, Judgement, *Kunarac*, *supra* note 50, at §153; Judgement, *Kvočka et al*., *supra* note 50, at § 369-370.

[119] Judgement, *Bemba*, *supra* note 7, at § 678.

[120] *Ibid*., at § 656. The Chamber ultimately found that '…that there is insufficient evidence to support a finding that the so-called Article 15, although applied by the MLC soldiers, was a formalised system of compensation adopted by the MLC. At most, the Chamber considers that the MLC hierarchy, which created the relevant circumstances, tacitly approved the measures that MLC soldiers took, including pillaging, to "make ends meet"' (§ 644).

[121] *Ibid*., at § 566. In their research with Congolese army soldiers in the DRC, Baaz and Stern similarly found that economic factors contributed to explaining why these soldiers raped. Fundamentally, the soldiers 'explained violence as a result either of a more explicit livelihood strategy or, more indirectly, as an expression of suffering and frustration related to poverty and neglect'. M.E. Baaz and M. Stern, 'Making Sense of Violence: Voices of Soldiers in the Congo (DRC)', 46 *Journal of Modern African Studies* (2008) 57-86, at 75-76.

[122] See, for example, Brownmiller, *supra* note 68; M. Turshen, 'The Political Economy of Violence against Women during Armed Conflict in Uganda, 67 *Social Research* (2000) 803-804; N. Farwell, 'War Rape: New Conceptualizations and Responses', 49 *Affilia* (2004) 389–403.

[123] J.N. Clark, 'Untangling Rape Causation and the Importance of the Micro Level: Elucidating the Use of Mass Rape during the Bosnian War', *Ethnopolitics* (2016), DOI: 10.1080/17449057.2016.1165919, available online at http://www.tandfonline.com/doi/abs/10.1080/17449057.2016.1165919?journalCode=reno20 (advance access).

Chamber's discussion of socio-economic factors is important precisely because it situates the complexities of causation within the specific operational context of the MLC.

The fact that the Trial Chamber considered the issue of motives, however, needs to be understood within the particular framework of the mode of liability charged (command responsibility). If Bemba's soldiers were raping and looting because they were not being adequately paid and were hungry, this constituted important evidence that he had 'failed to take all necessary and reasonable measures within his…power to prevent or repress' the MLC's crimes.[124] Indeed, the Trial Chamber explicitly stated that '…if the soldiers had received adequate payment and rations, the risk that they would pillage or rape for self-compensation, and murder those who resisted, would have been reduced, if not eliminated'.[125]

The Trial Chamber also implicitly acknowledged that preventing/minimizing the occurrence of rape necessarily requires a multi-dimensional approach. It did so by setting out very clearly a long list of the various measures that Bemba should have undertaken as a commander. These included ensuring that his troops in the CAR were fully trained in the rules of international humanitarian law, initiating genuine investigations into any crimes committed by his soldiers and altering troop deployments to reduce their contact with civilian populations.[126] In other words, contrary to Taylor's aforementioned assertion that we should be concerned with victims, not with perpetrators and their motives, the key point is that we are not required to choose one or the other. The *Bemba* Trial Chamber's discussion of command responsibility led it to highlight some of the practical steps that commanders could take that would potentially safeguard civilians from becoming victims.

6. Conclusion

This article set out to explore what the *Bemba* judgement adds to existing international jurisprudence on rape. It has examined three particular elements of the judgement, namely its definition of rape, its consideration of the effects of rape and its discussion of perpetrators'

[124] Article 28, Rome Statute, *supra* note 14.

[125] Judgement, *Bemba*, *supra* note 7, at § 739.

[126] *Ibid*., at § 729.

motives. All of these elements make the judgement distinctive in various ways. Fundamentally, however, the key jurisprudential contribution of the judgement is that it demonstrates how the Elements of Crimes potentially offer a more victim-centred approach to rape. Although it can be argued that the idea of consent still implicitly underlies the first three circumstances set out in the Elements of Crimes, the key point is that these circumstances are independent of the issue of consent. When circumstances are thus 'detached' from consent, the parameters of enquiry accordingly change. Rather than asking whether those circumstances affected a victim's ability to give free consent, we can focus more on how they affected the *individual* and what he or she experienced.